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Supreme Court of the United States

No. 71-2807

DONALD DAVIS, JR., a Minor by his Mother and Next Friend, Mrs. Sadie Davis, et al.,
Respondents
vs.
SCHOOL DISTRICT OF THE CITY OF PONTIAC INC., et al.
Petitioners

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[redacted]
WILLIAM WATERMAN
Attorney for Respondents
[redacted]
Pontiac, Michigan 48053
[redacted]

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PROCEEDINGS BELOW

The trial of this cause commenced on January 7, 1970 before the Honorable Damon J. Keith, United States District Judge For the Eastern District of Michigan, Southern Division. At the conclusion of the giving of testimony by all witnesses, argument and submission of briefs by counsel, the Court on February 17, 1970, entered its order, including but not limited to the following findings of fact:

1. Defendants admitted that segregation and racial imbalance existed in the Pontiac School system, and that such a situation is directly harmful to the development of those Negro children who suffer thereunder. (Pg. 3 memorandum opinion)

2. Defendants denied any responsibility for the segregated character of their schools, and argued that there is no affirmative duty to rectify a condition which they neither created nor advanced. (Pg. 4 memorandum opinion)

3. In 1967 after approximately twenty (20) years of nothing more than resolutions and policy statements regarding intent to strive for and achieve racial balance the board set its sights on the distant future and adopted a long ranged plan for school improvement and the achievement of an improved racial balance in the secondary schools of the School District of the City of Pontiac. (Pg. 8 memorandum opinion)

4. The Pontiac Board of Education *intentionally* utilized the power at their disposal to locate new schools and arrange boundaries in such a way as to perpetuate the pattern of segregation within the city and thereby *deliberately,* in contradiction of their announced policies of achieving a radial mixture in the schools prevented integration. (Pg. 13 memorandum opinion) (Emphasis ours)

5. Where the Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of *de jure* segregation. (Pg. 14 memorandum opinion)

6. The Court acknowledges the recently enunciated position that a Board of Education has no affirmative duty to eliminate segregation when it has done nothing to create it, but the Court finds that the Pontiac Board of Education did a great deal to create the patterns presently existing within the school district and now is responsible to take

action so as to eliminate the very situation it caused. (Pg. 15 memorandum opinion)

7. Just as there has been failure to implement pronounced policies regarding the elimination of segregation within the school body, so too has there been a failure to provide an integrated faculty or administration within the system. (Pg. 15 memorandum opinion)

8. The fact that the Board employs Negro faculty members when the majority of those teachers are confined to Black schools is indicative of a practice of following and indeed advancing the segregated characteristics of the schools. (Pg. 16 memorandum opinion)

9. Historically, Black teachers have been and continue to be assigned to Black Schools and White teachers assigned to White schools. (Pg. 16 memorandum opinion)

10. The record speaks for itself in this regard and warrants to magnified attention to reflect the discriminatory practices which continue to be followed in the Pontiac School system as to assignment of faculty and promotion of administrators. (Pg. 16 memorandum opinion)

11. Segregation of faculties alone is sufficient for a finding that a discrimination as to race has occurred in the Pontiac School system and that the Board is guilty of *de jure* segregation. (Pg. 16 memorandum opinion)

After enunciating certain conclusions of law based upon the facts as found by the Court, the Court entered the following order.

> *Based on the findings of facts and conclusion of law heretofore enunciated—it is the Order of this Court that the defendant Pontiac School District integrate its school system at all levels, student body, faculties and administrators, before the beginning of the school year of September, 1970.*

The Pontiac School District is further ordered to submit, for the Court's approval, on or before March 16, 1970, a comprehensive plan for the complete integration of the entire school system. Such integration shall be accomplished by the revising of boundary lines for attendance purposes, as well as by bussing so as to achieve maximum racial integration.

Pursuant to the Court's order two plans were prepared and submitted by defendants for integration of the Pontiac Public Schools. One was deemed unacceptable by the Court and the other approved and ordered implemented by September, 1970. Final judgment was entred in this cause on April 8, 1970. The approved plan for integration of the Pontiac Public Schools is contained, at Pg. 793, et. seq. Record.

On April 10, 1970, defendants filed a motion to vacate the order of the Court entered on February 16, 1970 and judgment entered April 8, 1970 and to dismiss plaintiff's complaint notwithstanding the entry of said order and judgment.

Defendants took an appeal from the order of the Court of February 16, 1970, the final judgment entered herein of April 8, 1970 and the order overruling the defendants' Motion to Vacate the Judgment and Order of the Court. Defendants claimed as a basis for their appeal that the Court erred to the detriment of the defendants as well as all of the students in the Pontiac Public Schools.

On May 28, 1971, the United States Court of Appeals for the Sixth Circuit, affirmed the Trial Court and remanded the cause to that Court for supervisory jurisdiction.

QUESTIONS PRESENTED

I. Whether or not the Pontiac Board of Education has an affirmative duty to eliminate racial imbalance that has been intentionally caused by manipulations of boundary lines and discriminatory hiring and placement practices.

II. Whether or not discrimination by defendants in the hiring and placement of instructional personnel and administrators is ipso facto a sufficient basis upon which a trial court may order the relief afforded by the trial court.

STATEMENT OF THE FACTS

The Pontiac School District consists of 29 elementary schools, 5 junior high schools and 2 high schools. The enrollment ratio of Negroes to Whites is approximately 30% Negro, 70% White.

At the time of both the institution and the trial in this cause, segregation and racial imbalance existed in the Pontiac Public Schools. This situation has been the admitted source and cause of emotional, psychological and educational harm to many Negro children who attend the Pontiac Public Schools.

Defendants did not deny the existence of the conditions causing the harm complained of by plaintiffs, but have asserted that they are not responsible for the condition nor under any obligation to institute corrective measures. They now, however, wish to challenge the assertion of harm by

plaintiffs, claiming that such a claim is unsupported by the evidence.[1]

Beginning in the year 1948, the School Board For The District of Pontiac expressed recognition of the necessity of administering the Pontiac Public Schools without regard to race or color as to hiring and placement of instructional personnel. Thus in 1948, the Board did in fact, adopt a policy of hiring and placement of instructional personnel without regard to race.

In the years 1954, 1955, 1960, 1964 and 1967, the Board passed a number of policy resolutions in which recognition of the necessity of achieving integration on both the faculty and pupil basis was evident. These resolutions were as follows:

> "Whereas, the Board of Education of the School District of the City of Pontiac is faced with the need for an extensive program of school building construc-

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[1] *The record does show both a recognition and admission of the harm that is caused by segregation. Testimony of Mr. John Perdue, Director of School Community and Human Relations wherein he states that in his opinion children are irreparably harmed by segregated schools. (Pages 123-124 Record)*

Defendants have also obviously ignored in this regard the fact that they did express an official recognition of harm that is occasioned by segregated schools as evidenced by the preamble to their 1964 resolution regarding integration.

> "Under our system of laws, it is the primary responsibility of each community to provide equal educational opportunities for all children in terms of quality instruction, adequacy of facilities and instructional materials, and opportunity for personal fulfillments. The latter can be accomplished to an adequate degree in our democracy *ONLY WHEN THE POLICIES AND PRACTICES OF THE SCHOOL SYSTEM PLACE A POSITIVE EMPHASIS UPON ACHIEVING AND MAINTAINING A RACIALLY INTEGRATED SCHOOL SYSTEM.*" (Emphasis ours)

In light of that policy pronouncement, it becomes very difficult to appreciate defendants disbelief or ignorance of the harm that constituted the very basis of their policy resolution.

tion in order to adequately provide educational opportunities for the children of this city; and

Whereas, it has been the practice of the Board of Education of the School District of the City of Pontiac to construct schools in terms of the location of children to be served by those schools irrespective of race, color or creed; and

Whereas, it seems necessary now to reaffirm publicly this above mentioned policy,

Therefore, the Board of Education of the School District of the City of Pontiac publicly declares it is the policy of this Board to locate additions to school buildings and new schools on the basis of nearness and accesibility of these facilities to the children to be served irrespective of their race, color or creed."

In 1955, the Board resolved to:

"Restate and reaffirm its policy to employ, upgrade and assign all applicants for administrative, teaching, secretarial, clerical, maintenance and all other position classifications within the table of organization on merit without regard to race, color, marital status, nationality or religion."

1960 Resolution:

"Whereas, the School District of the City of Pontiac has maintained as official policy that all pupils shall attend the school which serves the attendance area in which they live and

Whereas, this policy is maintained for all pupils without regard to race, color, nationality, or religious affiliation, and

Whereas, it now seems desirable to reaffirm this policy publicly,

Therefore, the Board of Education of the School District of the City of Pontiac publicly declares that it is the continuing policy that pupils shall attend the school which serves the attendance area in which they live, irrespective of race, color, nationality, or religious affiliation:

1964 Resolution:

"Under our system of laws, it is the primary responsibility of each community to provide equal educational opportunities for all children in terms of quality instruction, adequacy of facilities and instructional materials, and opportunity for personal fulfillments. The latter can be accomplished to an adequate degree in our democracy only when the policies and practices of the school system place a positive emphasis upon achieving and maintaining a racially integrated school system. Providing this equity in educational opportunities is a part of the process of educational planning, done by cooperative means consistent with the basic educational philosophy of our school district.

PUPIL PLACEMENT

Pupil placement practices of the school district must be based on sound educational principles, and should provide integrated school populations insofar as this is possible.

The neighborhood school concept is believed to represent sound educational practice. Pupils will be guaranteed the right to attend the school which serves their attendance area as established by action of the Board of Education. The Board of Education recognizes that circumstances arise occasionally wherein shifts of population necessitate the temporary provision of special

housing arrangements for pupils. These may occur in the future, but do not negate the broad principle enunciated here.

The present school attendance areas have been established on the basis of the following criteria: the nearness of the pupils to school, the safety of pupil access routes to school, and the reasonable capacity of the school. At such times as changes in school attendance areas may be required, an additional criterion will be observed. When possible the boundaries shall be drawn so as to provide integrated student bodies in schools. This added criterion will also receive consideration along with other criteria in the selection of sites for the location of new schools.

EMPLOYMENT AND ASSIGNMENT OF TEACHERS

It is the continuing policy of the Board of Education to employ, upgrade, and assign all applicants for administrative, teaching, secretarial, clerical, maintenance, and all other positions within the table of organization on merit without regard to race, color, marital status, nationality or religion.

The Board of Education believes it to desirable that alll school pupils should have the opportunity to receive instruction from White and Negro teachers during their years in school. Thus it is desirable to achieve and maintain an equitable distribution of Negro and White teachers in the various schools of the school district.

Teachers are professional persons, and as such have the right to have their views on their placement and assignments considered and respected. Furthermore,

it is sound educational practice to assess the specific qualifications of each teacher, the specific needs of each position and, to the degree possible, match the qualifications of the employee to the needs of the position.

It is believed that an equitable distribution of White and Negro teachers, respect for the views of teachers with regard to assignments, and matching professional qualifications with the needs of each position can and should be achieved through appropriate in-service education, encouragement, and administrative effort.

EDUCATIONAL PROGRAMS

It is the continuing policy of the Board of Education that educational programs of excellence must be provided for all pupils in all schools. Where special educational needs are found to exist, special educational programs and services will be provided to meet these.

Textbooks, instructional materials, and instructional programs should be examined in light of their adequacy with respect to the role and contribution of the Negro in America development, the effect of slavery and discrimination of Negroes as individuals and a group, and the implications of the civil rights movement. These emphases are essential elements in the instructional program if good inter-group attitudes and understandings are to be developed among all children, and if the Negro child is to develop a good self-image, pride in his race and heritage, and a sense of equality as a human being.

SCHOOL FACILITIES

It is the continuing policy of the Board of Education to provide the best possible school facilities for all schools and all pupils."

During the years 1955 through 1966, the boundary lines for attendance areas for the elementary schools were changed by the defendant Board of Education Twelve (12) times. Each change that was made either preserved the segregated character of the elementary schools or advanced this character. Accordingly, despite the many policy pronouncements spanning a period of 21 years, it was apparent at the time of the institution of this cause, that the Pontiac School Board had *intentionally failed* in the implementation of their policies. Thus when this action was filed, the following situation of racial imbalance existed in the Pontiac Public Schools.

ELEMENTARY SCHOOLS 1968-1969

School	*Enrollment*		*Staff*	
	White	*Non-White*	*White*	*Non-White*
Alcott	605	3	21	0
Bagley	2	577	7	14
Bailey	91	15	4	0
Baldwin	510	0	8	3
Bethune	0	470	8	14
Central	319	35	10	3
Crofoot	271	184	11	5
Emerson	656	0	20	1
Franklin	5	468	4	13
Frost	214	350	8	13
Hawthorne	350	9	13	0
Herrington	406	166	21	3
Irving	167	0	6	1
LeBaron	514	7	17	2
Longfellow	374	97	18	1
Malkim	577	5	19	1
McCarroll	325	3	10	2
McConnell	55	561	12	11
Owen	568	3	19	1
Rogers	378	0	11	2
Twain	423	334	12	11
Webster	783	1	24	2
Weaver	357	0	13	1
Whitfield	623	0	12	1
Whittier	0	499	2	13
Willis	284	4	11	1
Wilson	31	524	7	12
Wisner	572	0	19	1

Defendants have argued that they neither caused, contributed to, nor were in anyway responsible for this con-

dition.[2] They further asserted that the admitted segregated character of the Pontiac Public Schools resulted exclusively from housing patterns working against their justifiable implementation of the neighborhood school concept of attendance area zoning. They claimed that the neighborhood school concept precluded them from considering factors other than the folowing in drawing attendance boundaries:

1. Nearness of the school to the pupil.
2. Safety of access routes.
3. School capacity.
4. Racial balance of the school whenever possible.

The Pontiac School Board has ignored on many occasions any one of or all of these criteria in order to preserve the racial complexion of certain schools. For example defendants invoked the criteria of safety of access routes in justifying why White children who lived twice as close to the all Black Bethune School had to be assigned to the all White Webster School. Defendants claimed in this case that the thoroughfare of Orchard Lake Avenue was too hazardous for the children to cross in order to get them to the Bethune School.

This criteria, however, was suspended in assigning Black children to the Crofoot School. Accordingly, Black chil-

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[2] *For the 1969-70 school year, there were six (6) junior high schools in the Pontiac School District; 1 of which had 2 White students out of an enrollment of 526 (Jefferson); 1 of which had 4 Black students out of an enrollment of 814 (Kennedy); and one which had 5 Black students out of an enrollment of 738 (Lincoln).*

dren were made to cross the very same thoroughfare two blocks east in order to attend the Crofoot School.[3]

The criteria of nearness of the school to the pupil was abandoned by the Board in transferring and assigning Black children from the overcrowded Crofoot Elementary School to the Washington Jr. High School. This transfer necessitated some Negro children walking past the all White Webster School in order to get to Washington Jr. High School. (Pg 301 Record).

When the only opportunity occurred that that Board has had to implement its 1964 resolution regarding location of new schools in such a fashion as to assure racial balance it ignored this criteria, electing instead to construct the new Lincoln Elementary School in a totally White area, and then invited Black children to be bussed to it. (Page 304 Record)[4]

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[3] *Defendants admitted that many of the White children who attended the all White Webster School lived twice as close to the all Black Bethume School. Pages 276, 277, 287, 288 Record. The busiest thoroughfare, however, that had to be crossed by both the White children who attended the Webster School and the Black children who were assigned to the Crofoot School was Huron Street. Huron Street is the street on which both the Webster and the Crofoot Schools are located. In the case of the Webster School, a bridge was constructed in order to assure that the children could cross Huron Street in safety. On the other hand, the Black children who were assigned to the Crofoot School were simply left to take their chances crossing this busy thoroughfare.*

[4] *The construction of the new Lincoln Elementary School made a complete mockery of the 1964 resolution. Defendants in total defiance of their announced policy of selecting new sites for schools so as to assure integration, erected the new Lincoln Elementary School (now called Walt Whitman Elementary—1969), in an all White area, and then, as a placation to aggrieved Black parents, invited them to have their children bussed to that school.*

(continued on next page)

The many boundary changes that have been made by the defendants over the years, have advanced whenever possible the segregated character of the schools. In 1955, changes were made in the boundaries of the following schools: Baldwin, Central, Emerson, Hawthorne, Malkin, McCarroll, Owen, Weaver and Willis. In addition to these changes, boundaries were carved out for the newly constructed Bethune, Twain and Weaver schools.

The boundary for the new Twain School was carved out of the all White McCarroll, Emerson, and Baldwin attendance areas. This had the effect of capturing the Negroes who had recently moved into the White attendance areas of Emerson, Baldwin, McCarroll and confining them to the Twain School. The all White character of the three surrounding schools was therefore, effectively preserved. In this instance, bussing was used as a supplement to gerrymandering in order to prevent integration of the Emerson, Baldwin and McCarroll Schools.

When the new Twain School was erected, the adjacent Baldwin School did have the capacity to absorb the Black children who were assigned to Twain. This was evidenced by the fact that the Baldwin School was the recipient of White children from the northeastern part of the district who were being bussed there. However, rather than to

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(continued from preceding page)

The court's particular attention is directed to the fact that the arguments of the defendants against bussing, for the sole purpose of achieving integration, have been many and varied. Defendants, however, have failed to consider the fact that Black children in the Pontiac School District were being bussed to the new Lincoln Elementary School for the same reasons that they claimed were unreasonable and unjust as to White children. The obvious import of defendant's argument is that bussing for the sole purpose of achieving racial balance is all right so long as it is Black children that are being bussed. Here the neighborhood school concept and the Board's policy resolution of 1964 were subordinated to the interest of creating an illusory march toward integration.

have the Black students attend the Baldwin School in their area, that had the capacity to accommodate them, the Board elected to build the new Twain School in order to absorb the Black students and at the same time continued to bus White students from the northeast into the Baldwin School.[5]

The Trial Court, therefore found that the Pontiac Board of Education intentionally utilized the power at its disposal to locate new schools and arrange boundaries in such a manner as to create and perpetuate segregation within the city.

INSTRUCTIONAL PERSONNEL AND ADMINISTRATORS

Historically Black teachers have been assigned to Black schools. The power of hiring and assignment of instructional personnel reposes solely in the defendant Board of Education. The Board until January, 1967 delegated some of its placement authority to principals. At the time of the bringing of this action, there were three (3) elementary schools in the Pontiac School District that were devoid of Black instructional persons, and 13 that had 2 or less Black staff.

Defendants asserted during the trial that the reason for the racial imbalance among faculties was that the principals, to whom the power of placement of new instructional

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[5] *The consequence of these boundaries manipulations becomes patently clear when attention is directed to the enrollment ratio of Black to Whites in the schools in question some fourteen.* (14) *years later.* (*See chart in this brief*). *Here, we observe that the Baldwin, McCarroll, and Emerson Schools involved in these boundary changes remained totally White with the exception of three* (3) *Black students attending the McCarroll School. The Twain School on the other hand, which was carved from the attendance areas of these schools had an enrollment of 334 Black students.*

persons had been delegated, had practiced discrimination against Negroes seeking placement on their staffs. (Pg. 429-431 Record)

The following dialogue occurred at Pg. 429-431 Record during cross-examination of defense witness, Lewis Crew, Director of Instructional and Non-Instructional Personnel for the School District of the City of Pontiac.

> Question by Mr. Hatchett: Now, you noted in your earlier testimony that in 1967 the School Board found it necessary to take from the principals of the various schools their right to veto placement made by you; is that not correct?
>
> Answer by Mr. Crew: Yes, sir. This was in January of 1967 when we decided to centralize the authority or the decision as to whether to employ or not to employ.
>
> Question: Well, now, by the time that you had hired a person and sent the person to a particular school, the person was in fact under contract, weren't they?
>
> Answer: Well, the process is a little different than this. They, at that point, were not employed prior to going to a school. In other words, the [494] school visit was a part of a decision as to whether someone was employed or not. Following January of 67, no.
>
> Question: I see. Now, could you tell me, if you can, Mr. Crew, just on how many occasions in the last year this right reposing in the principal, or, on how many separate occasions did the principal exercise his right to veto appointments made by you in central administration?
>
> Mr. Dudley: In what year, counsel?
>
> Question: The last year that the right was conferred—that was '67, I think you said, the right was taken in January of '67, was it?
>
> Answer: Yes. This is when we began this changed procedure, yes, sir.

Question: That would be in '66, then?

Answer: Yes. All right. How many times during that year?

Question: Yes.

Answer: I would have to recall Mr. Hatchett. I would say four or perhaps five times that I recall that principals called me and said—yes, well, is this—all right.

Question: That is all right. How do you recall, Mr. Crew, in your experience whether or not any teachers were rejected by a principal based upon the fact that that teacher was Black or White?

Answer: I can't recall a specific instance but I am sure that this was our [495] feeling on this or else we would never have come to the decision.

Question: But that was our feeling—

Answer: Yes, sir.

Question: —that discrimination was in fact being practiced?

Answer: It was, yes.

Mr. Hatchett: Thank you, nothing further.

The Trial Court found that the record of the Pontiac School Board spoke for itself as to proof of discriminatory practices in the hiring and placement of instructional personnel. The Court further held that segregation of faculties alone was sufficient for a finding that discrimination as to race had occurred in the Pontiac School District, and that the Board was guilty of de jure segregation. The Court at Page 17 of its memorandum opinion stated:

> *"In view of the racial imbalance which obviously exists in the faculties of the Pontiac School system, it is incumbent on the defendants herein to prove that such did not result from discriminatory practices on their part. This the Pontiac Board of Education has failed to do."*

The Pontiac School Board has traditionally used the neighborhood school concept as a disguise for furtherance or perpetuation of racial discrimination.

SUMMARY OF THE FACTS

The Pontiac School Board has intentionally utilized the power at its disposal to locate new schools and arrange boundaries in such a manner as to create and perpetuate segregation in the City of Pontiac. The Board has used the neighborhood school concept as a disguise for the preservation and furtherance of segregated schools in the district.

Teachers and principals have been admittedly assigned in the Pontiac School district on the basis of race. The racial imbalance as to faculty and administrative personnel in the Pontiac School District is glaring. Despite repeated policy pronouncements and resolutions passed by the Board, spanning a period of over twenty (20) years, segregation continued to be the rule in the Pontiac Schools until the recent implementation of the Court ordered desegregation plan.

WHY PETITION SHOULD BE DENIED

Defendants have sought to apply the rule enunciated in the cases of *Deal vs Board of Education* 419 F 2nd 1387 (Sixth Cir. 1969) Cert. denied 91 S. Ct. 163, *Downs vs Board of Education of Kansas City* 336 F. 2nd 988 (10th Cir.) 1964 Cert. Denied 380 U.S. 914, *Bell vs School City of Gary, Indiana* 324 F. 2nd 209 (7th Circuit 1963) Cert. Denied 377 U.S. 924, 84 S. Ct. 1223, 12 L. Ed. 2d 216 and *Henry vs Godsell et al* 165 F. Supp. 87, 89 (1958). In so

doing, they have necessarily been constrained to ignore certain distinguishing features of the cases.

Plaintiffs are the first to agree that if mere acquiescence by the defendants to neighborhood housing patterns were determined by the Trial Court to have been the only cause of the segregated condition of the Pontiac Public Schools, the *Deal* case would be controlling. The key to the distinction, however, is that in the *Deal, Downs, Bell* and *Henry* cases, supra, the Courts found that there were no factors attributable to the defendant's conduct that caused the harm complained of. In the *Deal* case, the Court said:

> *"If factors outside the schools operate to deprive some children of some of the existing choices, the school board is certainly not responsible."*

Such was not the case here, and herein lies the essence of the distinction.

Here the Court found that implementation of the neighborhood school concept by defendants to be merely a disguise for the preservation and furtherance of segregated schools in the School District for the City of Pontiac. The Court based its findings in this regard upon the arbitrary manner in which the neighbrohood school concept criteria was either invoked or suspended at defendant's pleasure.

The Court observed that since 1958, the defendant Board of Education had changed the boundaries of a total of 29 schools, and segregation in the Pontiac School District at the time of trial continued to be a fact of life.

Perhaps, the case against defendants would not have been so cogent had defendants pleaded indifference as to the racial character of its schools. However, this they have not done. On the contrary, defendants have passed numerous resolutions and enunciated lengthy policy statements evidencing both a desire and an intention to rectify the

segregation that it had caused. But on each occasion when the opportunity presented itself, the Board proceeded in a totally opposite direction.

How simple it would have been for defendants to have applied the safety of access routes criteria uniformly. Obviously, defendants' failure to uniformly apply this criteria perpetuated and advanced the segregated character of the Pontiac Public Schools.

It is submitted that in the *Deal* and other cases cited by defendants, nowhere was there such proof of the arbitrary application of a neighborhood school policy. Nowhere in those cases did the Trial Courts find that the neighborhood school concept was used merely as a disguise for the perpetuation of segregated schools; invoking the policy at times and suspending it at other times at its pleasure. Nowhere in those cases did the Trial Courts find boundary lines changed so many times having the effect of creating, fixing and cementing segregation in the district. Nowhere in those cases were the Courts able to find admitted discriminatory hiring and placement policies on the part of the Board.

Defendants' effort to invoke the doctrine of res judicata based upon *Henry vs Godsell* (supra) is totally without merit. Such an argument presupposes that no violations or wrongs have been committed by defendants since the decision in that case. (1958); The record, however, shows that nothing could be further from the truth. Often times it takes a period of years in order for present acts to clearly reveal themselves as acts of discrimination. The fifteen (15) year retrospective picture leaves no room for doubt as to the racial discrimination involved here. In any case, any one of the discriminatory acts by the defendants since 1958, would suffice as a basis for a new cause of action on the part of plaintiffs and members of their class.

It is apparent that defendants' inquiry in their petition as to "what is segregation?" is merely a straw question. There is neither division in the Courts of the United States nor confusion in this regard. The fact that plaintiffs alleged de facto segregation in their complaint does not and should not in any way alter the facts of the case. Suffice the allegation to have charged that:

> *"Defendants have drawn the zone attendance lines for elementary schools which have as their purpose and/or effect the maintenance of separate schools for Negro children." (Para. 7—Count 1 Plaintiff's Complaint) (Record Pages 3-8)*

Accordingly, regardless as to what terminology is used to describe the wrong, the obvious contravention of rights secured under the 14th Amendment to the United States Constitution is no less conspicuous.

The Trial Court, therefore, correctly found that the Pontiac Board of Educaton was guilty of de jure segregation in defiance of the decisions in the cases of *Brown vs Topeka Board of Education* 349 U.S. 294 (1954). *U.S. vs School District No. 151,* 301 Fed. Supp. 201, (1969).

The Sixth Court of Appeals in affirming the Trial Court here as to the facts, law and the remedy ordered, specifically applied the decision of the Supreme Court of the United States in *Swann vs Charlotte-Mecklenberg Board of Education,* 39 U.F.L.W. 4437 (1971).

The lower Courts in this cause also found that the faculty and the administrative composition of a given school is so inextricably involved in the overall character of the schools that a finding of discrimination as to the hiring and placement of instructional personnel, is alone sufficient for a finding of de jure segregation. The Trial Court in this regard stated as follows:

> *"In view of the racial imbalance which obviously exist in the faculties of the Pontiac School System, it is incumbent upon the defendants herein to prove to that such did not result from discriminatory practices on their part. This, the Pontiac Board of Education has failed to do."* (See *Chambers v. Hendersonville City Board of Education)* (4th Cir. 1966) 364 F. 2nd 189; *Rolfe v. County Board of Education of Lincoln County Tenessee,* (Sixth Cir. 1968) 391 F. 2nd 77)

The Trial Court went on to quote from the language in the case of *Wheeler vs Durham City Board of Education;* (4th Cir., 1966) 363 F. 2nd 738.

> "The locus standi of pupils and parents to question *faculty assignments was conclusively declared in Bradley v. School Board, supra,* 382 U.S. 103, 86 S. Ct. 224. *We read the decision as authority for the proposition that removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil segregation in public schools as pronounced in Brown v. Board of Education, supra,* 347 U.S. 484, 74 S Ct. 686. *Hence no proof of the relationship between faculty allocation and pupil assignment was required here. The only factual issue is whether or not race was a factor entering into the employment and placement of teachers."*

The most reliable evidence presented at the trial of the true intentions of the defendants regarding the overall conduct of its affairs is the evidence regarding the manner in which they exercised powers that were exclusively theirs and not subject to outside influences, such as neighborhood housing patterns. Here, the defendants were admittedly discriminatory or at best knowingly acquiesced to discri-

minatory practices by its principals regarding the hiring of instructional people.

The figures of placement by race of instructional personnel in the Pontiac School District (See chart, this brief), clearly indicates that race has been a factor in the hiring and assignment of Black instructional personnel to the schools. The same is true as to the assignment of Black principals in the schools.[6]

Since the appointment and assignment of faculty and administrative personnel is the exclusive province of the defendant, the blame for the condition of extreme racial imbalance must rest solely with the defendants. The Trial Court, therefore, found that the defendants did have an affirmative duty to correct racial imbalance which was admittedly caused by their discriminatory practices.

It was, therefore, proper for the Trial Court to infer or presume that the discrimination that had occurred in the area of teacher placement and principal assignment has also occurred regarding the more coveted higher administrative positions. It may be justifiably assumed that the reason that the Pontiac School District does not have a Black assistant superintendent is because race has been considered in staffing those positions. The defendants' argument that the matter of hiring an assistant superintendent is properly a question of legislative or administrative discretion, must yield to the reasonable presumption that the legislative and administrative discretion has been and will continue to be exercised in a discriminatory manner,

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[6] *When this action was filed, there were six (6) Negro principals out of a total of thirty-seven (37) in the Pontiac School System. All Black principals with but one (1) exception were assigned to all Black or predominately Black schools. The one (1) exception was a Negro principal who had been assigned to a predominantely White elementary school that is scheduled to be phased out in 1971.*

absent intervention by the Courts. The Court stated in *Swann vs Charlotte-Mecklenberg Board of Education*, supra:

> *"The objective today remains to eliminate from the public schools all vestiges of state imposed segregation. Segregation was the evil struck down by Brown I as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of Brown II. That was the basis for the holding in Green that school authorities are clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.*
>
> *If school authorities fail in their affirmative obligation under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a District Court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."*

It is therefore submitted that the order of the District Trial Court that the Pontiac District forthwith assign a Black person to the assistant superintendent level, is consistent with the language of Swann *Supra.*

For the foregoing reasons, it is urged that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

ELBERT L. HATCHETT
WILLIAM WATERMAN
Attorneys for Respondents
485 Orchard Lake Avenue
Pontiac, Michigan 48053
313-334-1587

Of Counsel
NORRIS MULDROW
35 E. 7th Street
Cincinnati, Ohio